No. 20219

IN THE

United States Court of Appeals For the Ninth Circuit

PALMBERG CONSTRUCTION CO.
an Oregon corporation,
Appellee,

v.

SIMPSON TIMBER COMPANY,
a Washington corporation,
Appellant.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

APPELLANT'S BRIEF IN REPLY AND REPLICATION

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PREFACE

This brief is a consolidation of Simpson Timber Company's answer to the Palmberg Construction Co.'s opening brief in support of its appeal and reply to the Palmberg Construction Co.'s answering brief to Simpson's opening brief. Inasmuch as Simpson is both appellant and appellee and Palmberg is both appellant and appellee, the parties herein will be referred to as Simpson and Palmberg. Simpson will follow the procedure adopted in its opening brief (because of consecutive paginations) and refer to references in the reporter's transcript as Rt. and references in the clerk's transcript as Ct.

SUMMARY OF ARGUMENTS

Palmberg has failed to accept and comply with a fundamental axiom of litigation—that is, that the burden of proof is upon the plaintiff. Instead, Palmberg, which was the plaintiff in the lower court, has proceeded on

the assumption that Simpson (the defendant) has the burden of proof to show that Palmberg's unsupported allegations are not true. Although Rule 18, 2(e) of the Rules on Appeal of this court requires that references to facts in briefs be supported by specific references to the record, Palmberg's brief in its most pertinent portions fails to comply with this rule. Palmberg has cited legal authorities in support of its proposition which will not withstand even a cursory scrutiny. Simpson frequently stated in its opening brief that *there is no evidence in the record to support the allegations of Palmberg and certain of the instructions of the trial judge,* Palmberg has not refuted those statements of Simpson with any citations of evidence in the record. Instead, Palmberg's response has simply been that Simpson has cited only the evidence which is most favorable to it. *The reason for Palmberg's failure to cite evidence in the record or legal authorities supporting its propositions is simple. They do not exist.*

Reply to Palmberg's Assignment of Error No. 1

In this assignment of error, Palmberg alleges that the court erred in refusing to grant its request for interest on the sum of $16,187.00 tendered to it by the Simpson Timber Company on November 6, 1961. It is the contention of Palmberg in its brief that Simpson withheld payment of this amount because of an unliquidated counterclaim. This contention is not true. Simpson did not withhold payment of this amount, but in fact tendered it to Palmberg (Pl. Ex. 18) which refused to accept the money for the reason that apparently it did not consider $16,187.00 a liquidated amount (Pl. Ex. 19). On this basis the trial judge refused to grant Palmberg's request for interest.

Interest anterior to judgment is not allowable in the State of Washington unless the amount in controversy is a liquidated amount.

> "I think it may be stated that interest is allowable when a claim is stated, or liquidated as to amount. *A stated account is an agreed balance. An account which has been examined by both parties* (1 Bouv. Law Dict. 109) . . . *'Liquidated' means declared by the parties to be the amount).*" (Emphasis supplied), *United States v. Skinner and Eddy Corporation*, 28 F.2d 373 (9th Ct. of Appls., 1928) at p. 385-386.

Accordingly, the above amount, $16,187.00, could not have been a liquidated amount upon which Palmberg is entitled to interest anterior to judgment unless both parties agreed to it. There is no question but that Simpson believed that all it could possibly owe Palmberg was $16,187.00, but, this amount was tendered to Palmberg Co. *only* in full payment of Simpson's obligations under the contract:

> "We, therefore, enclose our check in the sum of $16,187.00 *as payment in full of all obligations of Simpson to you arising out of its Purchase Order No. 52471-PE, dated January 12, 1960, as amended by Supplemental Purchase Order* dated February 17, 1960. (The written contract.) Should it be unacceptable on that basis, we request it be promptly returned." (Pl. Ex. 18). (Emphasis supplied)

This tender did not require that Palmberg by accepting the check would waive all of its rights, if any, against Simpson, not arising out of the contract (such as claims for work done but not provided for in the contract) nor did Simpson represent that the figure of $16, 187.00 was arrived at by deducting an unliquidated counterclaim. Simpson only requested that the amount be accepted as full payment under the contract with no offsets.

Palmberg cites the case of *Walla Walla Port Dist. v. Palmberg*, 280 F.2d 237 (9th Ct. of App. 1960) in support of its right to interest on the sum of $16,187.00. What Palmberg has failed to recognize is the clear distinction that the court drew at p. 241 of its decision:

that is, the distinction between a tender of payment represented to be payment in full for all work performed, and a tender of payment represented to be payment only for work done under a contract. It is the latter type of tender that was made by Simpson.

Palmberg never billed Simpson for $16,187.00. Palmberg refused to agree that the sum constituted full payment under the contract; how could the $16,187.00 constitute a liquidated amount upon which Palmberg is now entitled to interest?

It is particularly anomalous and inconsistent that Palmberg should now take the position that this amount was was liquidated. Palmberg, prior to the trial and during the trial, attempted to prove that Simpson had made a mistake in computing the $16,187.00 because it had not credited Palmberg with the full amount of materials contained in the fill area.

In addition, Palmberg submitted evidence purporting to show the amount of the work it did, nature of the work and the value of its services.

> ". . . If evidence is necessary to establish the amount of the claim, then interest anterior to judgment is not allowable. 'Where, however, the demand is for something which requires evidence to establish the quantity or amount of the thing furnished or the value of the services rendered, interest will not be allowed prior to judgment.' *Wright v. Tacoma,* 87 Wash. 334, 353, 151 Pac. 837; *Lloyd v. Am. Can Co.,* 128 Wash. 298, 314, 222 Pac. 876; *Brewster v. State,* 170 Wash. 422, 424, 16 P.2d 813"; [*Hansen & Rowland v. C. F. Lytle Co.,* 167 F.2d 170 (9th Ct. of App., 1948).]

The trial court correctly refused to grant Palmberg interest anterior to judgment, for there never was a liquidated amount upon which interest could be computed.

Reply to Palmberg's Assignment of Error No. 2

In its Assignment of Error No. 2 Palmberg argues that

it was prejudiced by the pretrial judge's order granting in part and denying in part defendant's motion for summary judgment (Ct. 134). Palmberg's arguments supporting this assignment of error are somewhat difficult to follow. They appear to be, (1) that the partial sumjudgment was only interlocutory and, (2) because of the order it was prevented from submitting evidence to the jury.

It is difficult to understand how Palmberg was prejudiced because of the fact that the partial summary judgment entered by the court (Ct. 135-136) was interlocutory in nature rather than final. The burden was upon Palmberg to convince the trial judge that, if it was prevented in any manner from introducing evidence in support of its cause, that the partial summary judgment should be relaxed or modified. In actual fact, Palmberg was not prohibited by the trial judge from introducing any evidence at the time of trial on the basis of the partial summary judgment although Simpson argued strenuously that certain evidence submitted by Palmberg did in fact fall within the prohibitions of that partial summary judgment. Palmberg has not cited this court to one instance in the record where the trial court sustained an objection to its evidence because of the partial summary judgment, nor has Palmberg cited one instance in the record where it made an offer of proof of evidence excluded by the partial summary judgment.

The second argument of the Palmberg Construction Co. in its support of this assignment of error is that it was precluded by the partial summary judgment from introducing evidence in support of its cause. As pointed out above nothing can be further from the truth. On page 20 of its brief, the Palmberg Construction Co. states:

> "By reason of this order Palmberg at trial was not permitted and did not attempt to introduce its evi-

> dence of what it had been told by Simpson as to the nature of the materials and the quantities and amounts in the areas originally designated."

This statement by Palmberg is not true. The trial court specifically ruled that Palmberg could introduce any such evidence in order to show a breach of duty on the part of Simpson (Rt. p. 40, L. 21-p. 42, L.22), however, no such evidence was even introduced. (Simpson's opening brief, p. 45).

Palmberg suffered no prejudice by the entry of the partial summary judgment.

Reply to Palmberg's Assignment of Error No. 3

It was and is Simpson's position that Palmberg breached its contract because it failed to complete the work within the time provided in the contract. The factual matter with respect to the time for completion are not in controversy. After the original documents comprising the contract were executed, Palmberg, by its letter of February 5, 1960 (Pl. Ex. 9) offered to bring another dredge on the job under certain terms and conditions. Simpson did not accept this offer, but rather submitted to Palmberg its purchase order dated February 17, 1960 (Pl. Ex. 10), which specifically conditioned the modification of the original agreement requiring the addition of a second dredge as follows:

> "Supplemental to the terms and conditions included in Purchase Order No. 52471-PE for fill by hydraulic dredging, the following additional terms are added to cover the operation of a second 12-inch dredge *in order to permit completing of the fill operation by June 1, 1960.*" (Pl. Ex. 10.) (Emphasis supplied)

These terms and conditions were added for one purpose and one purpose only, to permit completing the fill operation by June 1, 1960. Palmberg accepted Simpson's counter-offer by supplying a second dredge to the job

and by billing Simpson for an additional $4,500.00 mobilization charge (Rt. P. 762, L. 10; P. 763, L. 6). The law is quite clear that an offer which calls for the doing of a particulaar act by the offeree may be accepted by performance of that act. 17 C.J.S. *Contracts*, Sec. 41(d), p. 668.

The trial court's failure to rule as a matter of law that the contract provided for a completion date, and its leaving that portion of the contract for the jury's construction was clearly beneficial to Palmberg rather than prejudicial. The failure of the trial court to instruct the jury that the contract provided for a June 1, 1960, completion date is an additional example of how the instructions given were prejudiced in favor of Palmberg and deprived Simpson of its substantial rights.

Replication on Simpson's Assignment of Error No. 3

In Simpson's Assignment of Error No. 3 (Simpson's opening brief, p. 30), Simpson urged error to the court's Instruction No. 7.

Palmberg in its brief has cited no authorities in support of this instruction for the simple reason that there are none. As pointed out in Simpson's opening brief (p. 30), this instruction does not state the law.

Palmberg attempts to justify this instruction by arguing that there is evidence in the record of Palmberg's inquiries with respect to the included matters, and that there is evidence that Simpson failed to make a full disclosure. Palmberg supports these arguments only by untrue statements and misrepresentations of the record.

At page 28 of its brief, Palmberg represents that there were presumably records of prior dredging work available to Simpson which Simpson made no effort to review and never produced. Palmberg has failed to inform the court that there were no such records available to

Simpson (Rt. 125), but in fact Simpson did make available to Palmberg prior to the time that the contract was actually executed, its engineer, Mr. John Sells, who was familiar with the prior dredging work (Rt. 802).

Mr. Sells, who was not employed by Simpson at the time of trial, testified as follows:

"Q. For what reasons were you introduced to these contractors?

"A. *Well, because I was familiar with the ground, and I had worked on the previous dredging.*" (Rt. p. 802, L. 11-20)

At page 28 of its brief, Palmberg states that Simpson failed to disclose to Palmberg the fact that there were not 350,000 cubic yards available in the primary dredge area. This is not true. It was the testimony of Oliver Ashford, Simpson's engineer, that this fact was revealed to Palmberg prior to the contract (Rt. p. 153) and there is no controversy that accurate cross-sections showing the exact amount of materials in the primary dredge area were furnished to the Palmberg Construction Co. prior to commencement of its operations (Rt. p. 444, L. 2-6, p. 442, L. 25—p. 443, L. 25). At page 29 of its brief, the Palmberg Construction Co. states:

> "Simpson's engineer testified that he told Palmberg prior to the formation of the contract that Simpson had no knowledge of any piling."

This statement is misleading. The actual statement of Simpson's engineer was:

"Q. Then what specifiically did you advise Mr. Palmberg about the possibility that there might be some buried or submerged piling in there?

"A. Well, that was the same statement that we gave to all the bidders, that while we had no knowledge of any piling, *it is possible that there are some that are broken off and eaten down to the gravel line of the fill.*" (Rt. 226, ll. 1-8)

Although as Palmberg has indicated at page 29 of its brief, Simpson acknowledged that some of the buried piling encountered by Palmberg in its operation were part of an old railroad trestle, Palmberg introduced not a scintilla of evidence that Simpson knew of this fact prior to the time that dredging was done by Palmberg. In fact, Palmberg itself discovered that this piling was part of an old dock (Rt. 549, ll. 11-13). The testimony of Palmberg's witness was that the pilings were driven in the 1800's (Rt. p. 549, ll. 11-13), which was substantially prior to the time that Simpson had any operations in the Shelton area (Court's Instructions to Jury, p. 12, Admitted Fact No. VIII).

At page 29 of its brief, Palmberg states:

> "Specific inquiry as to the nature of the materials was made by Palmberg." (Rt. 103-104)

Obviously this statement was made in an effort to show that inquiry was made by Palmberg with respect to the matters included in the instruction. This statement by Palmberg is not true. The only evidence of inquiry is testimony by H. G. Palmberg (Rt. 103-104) as follows:

> "I raised the question about the possibility of cobbles of a larger size, running into boulders, whether or not these might prevail at greater depths in the area proposed to be dredged . . ." (Rt. 103, ll. 11-15)

Palmberg has cited no evidence in the record tending to prove either directly, circumstantially or impliedly that Simpson's response to this question was not truthful and to the full extent of its knowledge, nor has it cited the court to any evidence in the record showing that it encountered "cobbles of a larger size" at greater depth during its dredging operations. Palmberg's own dredge operator testified:

> "We didn't have any shut downs as I remember on materials, sand and gravel materials too large to go through our pipe." (Rt. p. 557, ll. 14-16)

Clearly, the above inquiry and Simpson's response cannot support the instruction urged as error.

At page 30 of its brief, Palmberg Construction Co. states:

> "The jury was also clearly entitled to find that Simpson knew or should have known much more about the nature of the materials and the likelihood of substantial obstacles being encountered in the areas than was included in those disclosures which it elected to make."

The Palmberg Construction Co. has not pointed to one disclosure made by Simpson which was not full and complete to the best of its knowledge.

Palmberg's argument against Simpson's Assignment of Error No. 3 is contrived without concern for the truth. At pages 18 and 19 of Palmberg's brief, where a contrary proposition is in its favor, Palmberg argues as follows:

> ". . . The written contract contained no warranties with respect to the quantity not only of trash, but of such obstacles as sinker logs, concrete blocks, buried and submerged piling and other foreign objects encountered. Obviously, the written contract contemplates no such possibility and itself contained no warranty with respect to the absence or presence of such conditions, *which were obviously unknown at the time to either of the parties.*" (Emphasis supplied)

This statement of Palmberg's which is wholly inconsistent with its reply to Simpson's Assignment of Error No. 3 constitutes an admission by Palmberg Construction Co. that there is no evidence in the record showing prior knowledge on the part of Simpson Timber Company. The fact that the parties were unaware of such conditions did not, however, prevent them from making provisions in the written contract for their occurrence (Df. Ex. A1, p. 2).

Replication on Simpson's Assignments of Error No. 4 and No. 5

Palmberg attempts to justify the trial court's giving of Instructions No. 20 and No. 22 by citing the case of *Walla Walla Port District v. Palmberg*, 280 F.2d 237 (9th Ct. of App. 1960) (P. 31 of Palmberg's brief). The *Walla Walla Port District v. Palmberg* case was one in which the Palmberg Construction Co. (then a proprietorship owned by H. G. Palmberg who is the president, principal owner and operator of Palmberg Construction Co., a corporation) alleged that the Walla Walla Port District had certain information with respect to subsurface conditions which was not revealed even though Mr. Palmberg made specific requests for such information. At the trial of the *Walla Walla Port District* case, it became clear that in fact the Walla Walla Port District did have information which it had not revealed to Mr. Palmberg. It is of interest to note that Mr. Palmberg in this action has made allegations and representations in the pretrial order and the proposed statement of the case to the jury which are almost identical with those made in the *Walla Walla Port District* case. However, from an examination of the record in this case, it becomes clear that the *Walla Walla Port District* case and the present case are not similar. The record in this case does not show that Simpson Timber Company withheld any information it possessed from Palmberg (as Palmberg has admitted at page 19 of its brief) nor does the record in this case show that Mr. Palmberg made inquiry which was not truthfully answered.

The contract made specific provision for the occurrence of debris in Palmberg's dredging operations. Palmberg is not entitled to additional compensation for doing that which it contracted to do.

Palmberg in its brief makes frequent reference to the case of *Walla Walla Port District v. Palmberg, supra*, as

supporting many of its arguments. The *Walla Walla* case is factually distinguishable from the present case. However, an examination of the *Walla Walla* case is helpful for in the comparison between that case and the present case it becomes very apparent that Palmberg has virtually left no stone unturned in unsuccessfully twisting the facts of this case to make it merely a retrial of his *Walla Walla* case.

Replication on Simpson's Assignments of Error No. 6 and No. 7

Palmberg in its brief has given no citations of authority or any argument containing merit in opposition to Simpson's Assignments of Error No. 6 and 7. Therefore, no further argument is considered to be necessary.

Replication on Argument on Assignment of Error No. 8

Palmberg cites no evidence in the record to support Instruction No. 27 other than a reference to Pl. Ex. 25 which is Palmberg's letter of November 3, 1960 and Pl-Ex. No. 12, Palmberg's letter of February 20, 1961. Examination of both of these letters readily demonstrates that neither of them constitutes a demand for additional compensation, or, in fact, allege a change in circumstances from those provided for in the contract. Neither of these letters sets out any terms of the alleged implied agreement. On p. 34 of Palmberg's brief, Palmberg states that "the jury was entitled to find that from that point forward Palmberg (obviously with Simpson's acquiescence) ceased billing at the contractual rate to await a final settlement." Palmberg cites no evidence in the record to support this statement which is simply not true. The record clearly indicates that immediately prior to Palmberg's November 3, 1960 letter it had been notified by Simpson that its billings were some 80,000 yards in excess of the actual amount of yardage placed in the fill and that its billings should be accordingly reduced (Pl. Ex. 11). Palmberg would now have the court believe

that subsequent to this notification, it withheld further billings to Simpson simply because it expected a final settlement, providing for additional compensation, apparently *ex contractu*. This is a flagrant misrepresentation on the part of Palmberg for the record specifically designates the reason why billings were withheld. Palmberg's monthly statements to Simpson set forth the reason why billings for yardages pumped were in fact withheld:

> "*Payment under this item to be held in abeyance pending resolution of final total yardage.*" (Pl. Ex. 31, statement on Nov. 7, 1960)

This same notation is found in Palmberg's billings to Simpson of December 5, 1960 and January 27, 1961 (Pl. Ex. 31). These statements of Palmberg clearly demonstrate the reason for withholding yardage billings, and Palmberg should not be permitted to mislead the court on this issue.

The most fatal defect, however, in Palmberg's argument in favor of an implied contract, is that it has not cited (and cannot cite) any evidence in the record of conduct on the part of Simpson which would support an implied agreement. The law of the State of Washington respecting this question has been stated as follows:

> "It has been repeatedly held in Washington that, to prove an implied contract the party claiming the benefit of such a contract must establish that there was a meeting of the minds of the parties on the terms of the implied contract . . ." (Citing cases)

Asheim v. Pigeon Hole Parking, Inc., 175 Fed. Supp. 320, 330, *aff.* 283 F.2d 288 (D.C. Ed. Wn. 1959, *aff.* 9th Ct. of App. 1960). See also *Kellogg v. Gleeson*, 27 Wn.2d 501, 178 P.2d 969 (1947); *Ross. v. Raymer*, 32 Wn.2d 128, 201 P.2d 129 (1948); and *Johnson v. Nasi*, 50 Wn.2d 87, 309 P.2d 380 (1957), where the court held at p. 91:

"The burden of proving a contract whether ex-

> pressed or implied, is on the party asserting it, and he must prove each essential fact, including the existence of a mutual intention."

Although Palmberg would like the court to find an implied contract, it has not, and cannot cite any evidence of such a contract.

Replication on Simpson's Assignment of Error No. 9

Palmberg at p. 36 of its brief states that Simpson admitted during trial that it was mistaken with respect to some information. Palmberg's reference is to page 153 of the transcript. An examination of that page of the transcript and other evidence submitted clearly shows that Simpson was not mistaken at the time the contract was actually entered into with respect to the indicated matter (Rt. p. 154-155, Pl. Ex. 8, Pl. Ex. 6 a-j). There could not have been a bona fide mutual mistake. The record further indicates that although Simpson may not have had actual knowledge of some subsurface debris, it warned Mr. Palmberg and other bidders that they should be aware of the possibility that such debris could be encountered (Rt. 226).

Although it may be that neither party was aware of debris which might be encountered, they made provision for the possibility of encountering it in their contract (Df. Ex. A 1 at p. 2).

The Washington Supreme Court in the case of *Thiel v. Miller,* 122 Wash. 52, 58, 209 Pac. 1081, 1084 (1922) held:

> "This is not a case of mistake of either party in erroneously consciously assuming as a fact that which was not a fact, . . . but it was a case of all parties voluntarily entering into a contract in the face of their conscious, present want of knowledge of facts, which they all then manifestly concluded would not influence their action or induce them to refrain from entering into the contract whatever the facts might

> be. We are of the opinion that there is no such mutual mistake here shown as to entitle appellants to a rescission of the contract . . ."

This principal is applicable in the present case.

In addition, there is absolutely no testimony in the record that Mr. Palmberg nor anyone else with Palmberg was unaware of the possibility of encountering these difficulties, and, in fact, Palmberg's dredge superintendent stated while on the witness stand that the obstacles encountered in the course of the dredging operation were quite ordinary to an area such as the Shelton Harbor (Rt. p. 548, ll. 18-20, Rt. p. 560).

The Palmberg Construction Co. has cited no evidence which would support the court's instruction on mistake.

Replication on Simpson's Assignment of Error No. 10

Palmberg, in its reply to Simpson's Assignment of Error No. 10, has for the first time throughout the course of this litigation attempted to draw a distinction between the word *debris* as used by the parties in the consummation of the contract and during the course of the dredging, and *debris* as Palmberg would now have the court believe that the word *debris* should be defined. Palmberg at the time it executed the contract and during the dredging operations intended the word *debris* to mean and in fact used *debris* to include all of the foreign obstacles and objects actually encountered in the dredging operations. In its letter of November 3, 1960 (Pl. Ex. 25), the Palmberg Construction Co.'s president, H. G. Palmberg, stated:

> ". . . that it seems that a contributing cause to this has been to a great extent due to the unusual amounts of *forest trash*, such as *limbs, logs, piling, sticks*, etc., which we have encountered . . ."

In its letter of September 6, 1961 (Pl. Ex. 14) the Palmberg Construction Co.'s president, H. G. Palmberg,

the person who actually prepared the contract providing for the occurrence of debris, stated:

> "Actually, in performing the work we encountered considerable quantities of *forest trash* (sic), particularly in the ferry channel area and in the Mill 2 site dredging area. Included in this *trash* was a considerable volume of *sunken logs* as well as *piling* that had been driven throughout the dredging areas, . . ."

In the September 6, 1961, letter (Pl. Ex. 14 at p. 4), the Palmberg Construction Co., in an itemization furnished to Simpson Timber Company, listed time loss attributable to debris encountered, including piling, logs, cement blocks, etc., as follows:

> "Actual pumping hours lost directly due to the encountering of forest *debris*, as submitted to you in previous tabulations . . ."

The Palmberg Construction Co.'s dredge superintendent referred to the obstacles encountered during Palmberg's dredging operations as "*ordinary debris*" (Rt. 548, ll. 13-17).

Clearly, at all times up until the filing of its brief, Palmberg included within the meaning of *debris* all the obstacles it encountered during its dredging operations for Simpson. Now in order to prevail, it must inconsistently distinguish between *debris* and other items.

It is interesting to note in *Walla Walla Port District v. Palmberg, supra,* in which the president of the present plaintiff corporation, H. G. Palmberg, was the plaintiff, Mr. Palmberg also made the allegation that he was entitled to additional compensation because of encountering certain foreign obstacles in the course of his dredging operations. His contract with the Walla Walla Port Commission made provisions for encountering "debris" as did Palmberg's contract with Simpson. In that case the "debris" consisted of asphalt paved roadways,

trees, fence posts, telephone poles, wire, etc. In the *Walla Walla Port District v. Palmberg* case, Mr. Palmberg was denied recovery for the difficulty he encountered in removing this debris because of the contract provisions. In this respect the *Walla Walla Port District v. Palmberg* case is factually similar to the present case. Mr. Palmberg knew the meaning of debris when he prepared the contract between the Palmberg Construction Co. and the Simpson Timber Company and these matters were provided for.

Palmberg is not entitled to any additional recovery because of debris encountered.

Replication on Simpson's Assignment of Error No. 11

In the first of its arguments on this assignment of error Palmberg attempts to show why the actual specifications for the job (the cross-sections Pl. Ex. 6a-j) cannot be incorporated in the contract. According to Palmberg's argument these cross-sections were only to be used for measuring the fill area. A simple reference to the contract shows that no such intention is apparent. The provision of the contract is:

> "Plats or cross-sections of surveys shall be given to us for checking before dredging commences and within thirty days after completion of the dredging operations." (Df. Ex. 1, p. 2)

There is no provision that these cross-sections would be limited only to the fill area.

When construing contracts the intention of the parties controls and the interpretation which the parties have placed on it will be given great if not controlling weight. *Kennedy v. Weyerhaeuser Timber Company*, 54 Wn.2d 766, 344 P.2d 1025 (1959); *Fancher v. Landreth*, 51 Wn. 2d 297, 317 P.2d 1066 (1957).

The interpretation that the parties place upon this provision of the contract is clear. A simple examination

of the cross-sections (Pl. Ex. 6a-j) shows that those cross-sections include both the fill *and the dredging areas.* In addition, Palmberg actually dredged the eastern areas shown on those cross-sections exactly as they are set forth and no objection thereto was made until some time after the commencement of this litigation.

In support of its second argument to this assignment of error, Palmberg cites the court (Palmberg's brief, pp. 44-45) to cases holding that where plans and specifications of work to be performed under a contract misrepresent conditions or the work to be done, the contractor may recover for resulting extra work or expense. Palmberg has failed to inform the court, however, that in each of the cases it cites, the plans or specifications in controversy were actually embodied in and made a part of the written contract. In the present case, the contract (which was prepared by Mr. H. G. Palmberg, Palmberg's president, Rt. p. 91, ll. 12-14) contains no reference whatsoever, either collaterally, indirectly, or impliedly, to Plaintiff's Exhiibt No. 2. *The only reference to plans or specifications contained within the contract which was prepared by Mr. Palmberg is to the cross-sections (Pl. Ex. 6a-j) which were in fact furnished to Mr. Palmberg for checking before dredging commenced.*

Simpson does not believe the contract between it and Palmberg contains any ambiguity with reference to its incorporation of the cross-sections (Pl. Ex. 6a-j). However, if there is such an ambiguity it must be construed in favor of Simpson and against Palmberg. *Osborn v. Boeing Airplane Company,* 309 F.2d 99 (9th Ct. of App., 1962); *Sunset Oil Co. v. Vertner,* 34 Wn.2d 268, 208 P.2d 906 (1949); *Wise v. Farden,* 53 Wn.2d 162, 332 P. 2d 454 (1958); *Caterpillar Tractor Co. v. Collins Machinery Co.,* 286 F.2d 446 (9th Ct. of App., 1960).

Replication on Simpson's Assignments of Error Nos. 12, 13, 14 and 15

In its argument on these assignments of error, Palmberg follows the procedure it has adopted throughout its brief, and makes general, vague reference to evidence, but, with one exception, does not, as is required by Rule 18, 2(e), Rules on Appeal, United States 9th Court of Appeals, cite where in the record that evidence can be found. The reason for its failure to do so is apparent. There is no such evidence. Simpson respectfully submits that inasmuch as Palmberg has not conformed with the rules on appeal, its arguments on these assignments of error do not merit consideration by the court.

The one exception wherein Palmberg has cited evidence in the record allegedly supporting its position is found at page 51 of its brief. This evidence allegedly proves that certain slopes constructed by Palmberg contained many thousand more yards of material than were represented and credited by Simpson. The evidence cited (Rt. pp. 584-88, 806, 815, 940-941) does not establish the actual amount of materials contained within the slopes but is merely opinion evidence by Palmberg's witnesses that a slope such as that constructed by Palmberg, under certain conditions would be flatter than as represented by Simpson. None of the witnesses who gave the estimates and opinions actually measured the slopes. There is in the record, however, an actual, accurate survey of the angle of the slopes in question and the amount of material contained therein which was furnished to Palmberg in October of 1961(Pl. Ex. 33, Rt. p. 388). This exhibit was represented to be an accurate cross-section of the amount of material contained within the slopes and no objection was ever made by Palmberg to it (Pl. Ex. 11). Although Plaintiff's Exhibit 33 is the only actual evidence in the record as to the amount of material in the disputed slopes, Palmberg has not even referred the court to it.

As pointed out in Simpson's opening brief, the only recovery that Palmberg can have in this action under Washington law is extra costs it incurred in doing work other than that provided for in the contract (Simpson's opening brief, p. 28). Palmberg in its argument of this assignment of error cites no evidence in the record supporting the fact that it actually sustained extra costs. In fact, the record clearly shows, as pointed out in Simpson's opening brief (pp. 61-64) that no extra costs were sustained. The record also discloses that Palmberg did not place in the fill area as many cubic yards of material as Simpson was willing to pay for (Simpson's opening brief, pp. 66-67). Palmberg in its brief, at Appendix I, has attempted to set forth an index of yardages represented moved and placed. This index is in its most pertinent points completely unsupported by the record. Simpson has at Appendix I of this brief demonstrated the inaccuracies of Palmberg's Appendix I.

Replication on Simpson's Assignment of Error No. 16

In its argument to this assignment of error, Palmberg attempts to dismiss Simpson's counterclaim for damages in delay of completion on two grounds:

1. That the contract did not provide for a completion date, and

2. If it did provide for a completion date, it was waived by the Simpon Timber Company.

As pointed out in the Simpson opening brief, the contract did specifically provide for a completion date of June 1, 1960 (Pl's. Ex. 10). (See pp. 6-7, *supra.* The Palmberg Construction Co. in its brief has not cited the court to any portion of the record which would support its theory that this completion date was waived by the Simpson Timber Company. Its argument is without merit.

Respectfully submitted,

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Attorneys for Appellant

APPENDIX I

Below is a copy of the Appendix I appearing in Palmberg's brief. Superimposed on those entries are Simpson's numbers corresponding with the notes below. These notes point out inaccuracies of the entries found on Palmberg's Appendix I.

AREAS TO BE DREDGED	AMOUNTS DREDGED FROM EACH AREA				CROSS SECTIONS EVER FURNISHED PALMBERG?
	As per Information Furnished other Bidders (R. 231) from Simpson's Ex. 8	As per Information Furnished Palmberg by map (Ex 2)	As per Representation On P. 66 of Simpson Brief	As per Actual Testimony	
Primary	222,370 1	350,000	222,370 2	Unknown (R. 523) but probably at least 222,000 (R. 520)	Yes
Car ferry	8,370 3 (to minus 1.0)	25,000 4 (to minus 1.0)	35,000	35,000 to 40,000 (pretrial, TR. 139) but dredged much deeper than -1.0) (R. 368) 5	Yes
Substitute	155,000 3	Area not shown but Palmberg shown aerial, told 75,000 6 (R. 105)	80,000	Unknown (R. 516, R. 521, R. 522, R. 523) 7	No! (R. 526, R. 521, 522) 8
Log pond (slip)	24,810 3	None 9	15,000	Unknown (R. 521) but probably maximum of 15,000 10 (R. 521)	No! (R. 526) 11
Log dump	None	75,000 (but agreed prior to contract Palmberg not to dredge because too trashy) (R. 105-110)	None	None	Yes! (R. 526) 12
Extended (East of primary)	31,000 3	None	107,000	Unknown (R. 513, 522-523) 13	Yes (Indicating 31,000) 14

1. This figure was furnished to Palmberg prior to the execution of the contract. (Rt. p. 153).

2. This figure was proven by testimony of H. G. Palmberg at the time of trial (Rt. p. 366, LL. 14-20) and is also proven by reference to the cross-section (Pl. Ex. 6 a-j).

3. Palmberg Construction Co. has not cited any reference to the record in support of this representation for the simple reason that there is none.

4. This figure would be correct if the car ferry channel were dredged to a minus 1.0 foot level and the plus 2000′ line as indicated on Pl. Ex. 2 (Rt. p. 233, LL. 1—p. 325 L. 12). Palmberg did not so dredge the car ferry channel but in fact dredged the car ferry channel as indicated on the cross-sections.

5. The car ferry channel was dredged deeper than minus 1.0 feet at the specific request of Palmberg that it be allowed to do so (Rt. p. 427, L. 17—p. 428, L. 1).

6. This figure is correct, but no representation as to amounts available were made by Simpson. Palmberg requested that this area be substituted for another area which it considered too trashy to dredge (Rt. 88, LL. 2-7). Palmberg represented that it would take 75,000 yards from this area (Rt. p. 105, LL. 6-7).

7. At the time of taking of his deposition, Mr. Palmberg recalled that 75,000 to 80,000 yards were in fact removed from the substitute area. This deposition was read into the record at the time of trial when Mr. Palmberg's memory failed him (Rt. p. 517, LL. 1-22).

8. No cross-sections of the substitute area were fur-

nished for the reason that it was substituted at the request of Mr. Palmberg shortly before dredging operations were to be commenced.

9. The log slip area was part of the log dump area which was included on the Pl. Ex. 2.

10. Mr. Palmberg testified at the time of trial that a maximum of 15,000 yards were removed from this area (Rt. p. 520, L. 24—p. 521, L. 6).

11. Cross-sections of this area were furnished to Mr. Palmberg as part of the log dump area (Pl. Ex. 6 a-j).

12. Cross-sections of the log dump area were furnished to Mr. Palmberg, but since he had requested that he not be required to dredge in that area, they were marked obsolete on the copies furnished Palmberg. The cross-sections are Pl. Ex. 6 a-j.

13. This representation is untrue. Testimony at the time of trial proved that 107,000 yards of material were removed (Rt. p. 818, L.6—p. 819, L.5).

14. This statement is untrue and is not supported by the record. Reference to the cross-sections Pl. Ex. 6 a-j indicates approximately 100,000 yards of material available to be dredged in the area east of the primary area.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

DALE E. KREMER
Of Counsel for Appellant